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No. 06-510

FILED
NOV 22 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the

Supreme Court of the United States

HILLSBORO PROPERTIES, and
PAUL GOLDSTONE ENTERPRISES, INC.
dba RANCHO GRANDE MOBILEHOME PARK,

Petitioners,

v.

CITY OF ROHNERT PARK, a
municipal corporation, and
CITY OF ROHNERT PARK RENT APPEALS BOARD,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal for the First Appellate District, Division Three

PETITIONERS' REPLY BRIEF

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Petitioners Hillsboro Properties and Paul Goldstone Enterprises, Inc.[1] (Hillsboro), hereby reply to the Brief in Opposition to Petition for Writ of Certiorari (Opp.) filed by Respondents City of Rohnert Park, et al. (City), on November 13, 2006. The Petition for Writ of Certiorari (Pet.) in this case asks this Court to enforce the mandate of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), which requires all states to provide a certain and adequate remedy of just compensation for violations of the Takings Clause of the Fifth Amendment. Hillsboro also asks this Court, pursuant to its recent decision in *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323, 125 S. Ct. 2491 (2005), to exercise direct review of Hillsboro's federal takings claim, for which no remedy at all exists in the California courts under the decision below.

I

THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE PROPERLY RAISED IN THE APPELLATE COURT

In compliance with Rule 14 of this Court, Hillsboro's Petition specifies that "[t]he question of whether Hillsboro was entitled to just compensation under the Fifth Amendment was argued and decided by the California Court of Appeal," with appropriate references to the Appendix. Pet. at 7. As was fully set forth in the Petition, the court below answered this question in the negative, thereby creating the need for this Court to resolve the specific Questions Presented in the Petition:

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[1] Paul Goldstone Enterprises, Inc., is a closely held corporation with no parent corporation and no publicly held company owning 10% or more of its stock.

Q1. Under *First English*, when a property owner has obtained a judicial determination that a rent control law is unconstitutional, may the City that administers that law avoid paying just compensation for the temporary abridgment of an owner's contractual right to collect lawfully noticed rents over the seven years in which the unconstitutional regulations were in effect?

This question seeks review of the ultimate issue presented to the lower court for adjudication. Given that Respondents vigorously disputed this question at every step of briefing and oral argument,[2] and the court below directly decided this question in that part of its opinion previously identified by Hillsboro (App. A-3 - A-4), it is not clear why Respondents would represent to this Court that this is a "new" question raised "for the first time in [Hillsboro's] petition to this Court." Opp. at 6. Suffice it to say, the record demonstrates that Respondents are mistaken.

Q2. Since Petitioners' regulatory takings claim is now ripe for federal adjudication, but Petitioners are barred from litigating their claim in federal district court by this Court's recent decision in *San Remo Hotel v. City and County of San Francisco*, should this Court directly rule on Petitioners' regulatory takings claim as a matter of federal law?

Obviously, this question could not have been presented to the court below in these terms, since it seeks a remedy newly specified by *this* Court in *San Remo*, to provide vindication of

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[2] *See, e.g.*, Respondents' Brief, California Court of Appeal Case No. A110441, at 8-11, 15-19; Answer to Petition for Review, California Supreme Court Case No. S143408, at 3-6.

federal constitutional rights that are not recognized or protected by the state courts of California. The decision below, denying Hillsboro a remedy for the City's *ultra vires* nullification of its contractual rights, was the triggering event that ripened Hillsboro's Fifth Amendment takings claim for federal adjudication. *See Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985). By (wrongly) deciding the question of "whether Hillsboro was entitled to just compensation under the Fifth Amendment," Pet. at 7, the court below directly created the need for this Court to resolve the second Question Presented.

II

THE COURT BELOW DETERMINED THAT NO REMEDY IS AVAILABLE IN CALIFORNIA FOR THE TAKING OF HILLSBORO'S PROPERTY, *NOT* THAT NO TAKING OCCURRED

A. The Court Below Avoided Reaching the Merits of Petitioners' Takings Claim by Limiting the Availability of a *Kavanau* Remedy to Cases Alleging Denial of a "Fair Return" Under a Lawful Rent Control Regime

The court below ruled that there is no remedy in California for Fifth Amendment takings in the context of residential rental property, unless the property owner alleges that he has been denied a "fair return" on that property. Thus, in the case at bar, the court upheld the City's confiscation of Hillsboro's contractual right to receive voluntarily agreed-upon rents, *even though the City had no lawful rent control regulation in place* over the relevant time period.

The Opposition Brief mischaracterizes the proceeding below as one in which "Hillsboro has not demonstrated that it suffered a taking." Opp. at 7. However, the facts establishing the taking are undisputed. Hillsboro was unlawfully prevented

from receiving contractually agreed-upon rents over a seven-year period by a regulatory scheme which was found, in the final decision of a federal court, to have been unconstitutional from its exception. Pet. at 6. Hillsboro's economic injury from the City's unconstitutional actions is fixed and certain, measured by the dollar amount of contractual revenues Hillsboro was illegally forced to forgo.[3] *Id.* Nothing remains to be adjudicated except the issuance of an order to the City to provide just compensation for the taking, as required by *First English.*

The court below chose to evade this responsibility by the simple expedient of ruling that *no remedy exists*, under California law, for the sort of taking Hillsboro has suffered. The California Supreme Court has established that the only remedy available in that state for regulatory takings effected in the context of residential rent control is a "*Kavanau* adjustment," increasing prospective rents to approximate the amount of compensation due. *See Kavanau v. Santa Monica Rent Control Board,* 941 P.2d 851, 865 (Cal. 1997). The court below extended that doctrine, ruling that the remedy of a *Kavanau* adjustment is available only in cases alleging denial of a "fair return." App. A-14. The City does not shrink from the implications of this doctrine: "State and federal precedent make clear that in the context of rent regulation, *a taking cannot exist absent the denial of a fair return.*" Opp. at 9 (emphasis

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[3] The City misstates the record again with its inexplicable assertion that "Hillsboro never stated that it had suffered economic injury." Opp at 12 n.8. This was, of course, the gravamen of Hillsboro's complaint, that was vigorously contested throughout the state court litigation – the loss of Hillsboro's contractual rights to receive contractually specified, freely agreed-upon rents in the absence of a lawful rent control ordinance. *See, e.g.*, Complaint at 8, ¶ 28: "Hillsboro has no effective remedy for the payment of damages that accrued between 1988 and 1995 when Ordinance 494 was wrongfully enforced by the city."

added). Under this reasoning, since a "fair return" under rent control is a term of art that has no meaning whatsoever outside the context of a specific, legally enforceable rent control law, *see* Pet. at 7 n.1, the City is free to confiscate anything it pleases from the owners of residential rental property during the period when no such legally enforceable law was in effect. If there is no remedy, the City reasons, there can be no taking. Q.E.D.

B. The Availability of an Inverse Condemnation Remedy Was Foreclosed by the Decision Below

The City consistently represents to this Court that plaintiffs in Hillsboro's position can obtain an inverse condemnation remedy in the California courts. *See* Opp. at 7 ("California courts do provide an inverse condemnation remedy"; "A landlord retains the ability to file an inverse condemnation claim in the event that a Kavanau adjustment is inadequate."). This is a remarkable assertion, given that inverse condemnation was specified as a cause of action in Hillsboro's complaint, App. A-10, and the decision below categorically foreclosed the availability of such an option in the state courts, App. A-13. And of course, as the City happily notes, *Hillsboro* now is also barred from pursuing an inverse condemnation claim in federal district court by *San Remo*. The truth is clear: no inverse condemnation remedy is available to Hillsboro anywhere, in any court, with the possible exception of this Court.

To reiterate, Hillsboro did not seek a "*Kavanau* adjustment" from the City because this was Hillsboro's preferred remedy. Rather, the California Supreme Court in *Kavanau* (and in *Galland v. City of Clovis*, 16 P.3d 130 (Cal. 2001)) had mandated that such an adjustment is the ***sole*** remedy available for a taking in the context of residential rental property. *See* Pet. at 11-12. When the City refused to process Hillsboro's application for a *Kavanau* adjustment, Hillsboro sued for inverse condemnation as an alternative remedy, relying

on the very passages in *Kavanau* and *Galland* the City now cites to this Court. App. A-2, A-8.

The court below, by restricting the availability of a *Kavanau* remedy to cases alleging denial of a "fair return," foreclosed ***both*** prospective rent increases ***and*** inverse condemnation as remedies for plaintiffs like Hillsboro, whose property is confiscated by operation of illegal rent restrictions having no relationship to a "fair" or "unfair" rate of return on rental property.

III

ONLY THIS COURT CAN DETERMINE THE MEANING OF *SAN REMO*, AND IT SHOULD DO SO IN THIS CASE

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), this Court determined that violations of the Takings Clause may not be adjudicated in federal court *until* just compensation has been sought and denied in state court. *Id.* at 194-97. In *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323, 125 S. Ct. 2491, it was further established that such constitutional wrongs may not be brought to federal court *after* compensation has been denied by the state judiciary. *Id.*, 125 S. Ct. at 2501-02. The only exception to this complete bar to access to justice —which for California property owners means access to the federal courts—is via direct review by this Court. *Id.* at 2499.

Understandably, the City is not disturbed at the prospect of the victims of its unconstitutional enactments having no federal forum in which to vindicate their federal constitutional rights. *See* Opp. at 11 ("[A] plaintiff claiming a regulatory taking has no special right to have federal takings claims decided in any federal court."). Coupled with the California doctrine established by the decision below, this would mean that Hillsboro and similarly situated plaintiffs would have no

remedy for the violation of their constitutional rights in *any* court, ever.

Because Hillsboro believes that the United States Constitution was intended to protect the rights of *all* citizens—regardless of the stigma of property ownership—and because there can be no protection of rights without a remedy for their violation, Hillsboro now respectfully petitions this Court to exercise direct review over the regulatory takings claim at issue in this case.

IV

THE CALIFORNIA COURTS' FLAUNTING OF *FIRST ENGLISH* IS A TROUBLING AND IMPORTANT FEDERAL QUESTION THAT WILL KEEP RETURNING TO THIS COURT UNTIL IT IS RESOLVED

At what point will this Court recognize and become concerned that its mandates are being ignored, and American citizens are being denied the protections of the Constitution, in the state courts of California? The City avers that the "California courts have competently adjudicated Hillsboro's federal claims in accordance with this Court's takings jurisprudence." Opp. at 11. But in fact, what the California courts have done is to establish that no remedy of any kind is available in that state for Fifth Amendment takings of the sort at issue in this case.

In the nineteen years that have passed since *First English*, the federal courts have engaged in astonishing evasions to avoid confronting the fact that California—the state with the most intense and intrusive regulations in the nation—has never once encountered a regulatory takings claimant entitled to just compensation under the Fifth Amendment. The mandate of *First English* has become no more than a hollow mockery, the sole effect of which is to ensure that California takings victims

cannot seek to enforce their constitutional rights in federal court.

The decision below is exceptional only in that it moves California's "no compensation" takings doctrine one step further, holding that *no remedy of any kind* is available in that state for the class of Fifth Amendment takings involved in this case—not just compensation, not equitable relief, not even an adjustment in prospective rents.

Until this Court grants certiorari for the purpose of instructing the California courts to comply with *First English*, or relaxes *Williamson County's* ban on access to federal courts, this situation will only grow worse. The time for this Court to deal with this disturbing and critical constitutional issue has come.

CONCLUSION

For all the reasons stated above and in Hillsboro's Petition for Certiorari, the Petition should be GRANTED.

DATED: November, 2006.

Respectfully submitted,

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